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IN THE

Supreme Court of the United States

October Term, 1958

No. 659

ARTHUR BARY, also known as ACHILLES DIAMANTIS DARAMPARIS, ANNA BARY, HAROLD ZEPELIN, also known as HARRY ZEPELINSKY, LEWIS MARTIN JOHNSON, JOSEPH WILLIAM SCHERRER, MAIA SCHERRER, also known as MAIA TURCHIN, and PATRICIA JULIA BLAU,

Petitioners,

vs.

UNITED STATES OF AMERICA, U. S. DISTRICT COURT FOR THE DISTRICT OF COLORADO, and THE HON. WILLIAM LEE KNOUS, CHIEF JUDGE THEREOF, AND THE JUDGES AND OFFICERS OF SAID COURT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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vs.

UNITED STATES OF AMERICA, U. S. DISTRICT COURT FOR THE DISTRICT OF COLORADO, and THE HON. WILLIAM LEE KNOUS, CHIEF JUDGE THEREOF, AND THE JUDGES AND OFFICERS OF SAID COURT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit denying petitioners' petition for the issuance of a writ or writs of prohibition and or mandamus staying the trial in the District Court of *United States v. Bary, et al.*, and ordering the dismissal of the indictment therein on the ground that the indictment is fatally defective for constitutional reasons.[1]

[1] Petitioners are represented by counsel who were appointed by the District Court to try the *Bary* case and who instituted and are prosecuting this proceeding with the knowledge and consent of that court.

Opinion Below

The majority below wrote no opinion. Judge Murrah, dissenting, noted on the order denying relief that he "would grant the writ on the grounds that the indictment is palpably and fundamentally defective because it does not reflect the action of the Grand Jury" (R. 14).[2]

Jurisdiction

The judgment below is dated and was entered on January 15, 1959. This Court has jurisdiction under 28 U. S. C. 1254.

Questions Presented

1. Whether a single count indictment charging a conspiracy to violate the "advocacy" and "organizing" provisions of the Smith Act is constitutionally defective where it appears from the face of the indictment that the grand jury misconstrued the applicable statute and returned the indictment in the erroneous belief, contrary to the subsequent decision in *Yates v. United States*, 354 U. S. 298, that the "organizing" portion of the conspiracy charged was not barred by the statute of limitations.

2. Whether, if question 1 is answered in the affirmative, the court below erred, after denial by the District Court of a motion to dismiss the defective indictment, in refusing to issue a writ or writs of prohibition and or mandamus staying the trial and directing dismissal of the indictment.

Constitutional Provisions and Statutes Involved

The Fifth Amendment, the Smith Act (18 U. S. C. 2385) and the All-Writs Statute (28 U. S. C. 1651) are set forth in the Appendix.

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[2] References are to the original typewritten record from the court below. "M" preceding the page reference denotes the stenographic minutes.

Statement of the Case

Petitioners, the defendants in *United States v. Bary, et al.*, seek review of the refusal of the court below, Judge Murrah dissenting, to issue a writ or writs of mandamus and/or prohibition staying a trial and directing dismissal of the indictment in the *Bary* case. The indictment (R. 7) like that in *Yates v. United States, supra*, charges a conspiracy to violate the "advocacy" and "organizing" provisions of the Smith Act, (18 U. S. C. 2385). Relief was sought below on the ground that this indictment is constitutionally defective because it was based upon an erroneous interpretation of the statute which led the grand jury to believe, contrary to the decision in *Yates*, that the "organizing" portion of the conspiracy was not barred by the statute of limitations.

The single count indictment, returned in August, 1954, charges the *Bary* defendants with conspiring (a) to advocate violent overthrow and (b) to organize as the Communist Party a group which advocates violent overthrow (R. 7). A trial in 1955 resulted in convictions. *Bary v. United States*, 248 F. 2d 201. Thereafter, this Court held in *Yates, supra*, that the Communist Party was completely "organized" within the meaning of the statute in 1945, and hence that the "organizing" portion of the conspiracy charged in that case was barred by the statute of limitations. Upon appeal of *Bary*, the court below reversed the convictions and remanded the case for a new trial, holding that in view of *Yates* the trial court had erred in refusing to withdraw the "organizing" portion of the conspiracy from the consideration of the jury. *Bary v. United States, supra.*[3]

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[3] Subsequent to the decision in *Yates*, Courts of Appeals have ordered judgments of acquittal in favor of all of the defendants in four Smith Act conspiracy cases: *United States v. Silverman*, 248 F. 2d 671; *United States v. Jackson*, 257 F. 2d 830; *United States v. Fujimoto* and *United States v. Huff*, 251 F. 2d 342. The indictments in *Yates* and five other cases were dismissed on motion of the government. *U. S. v. Wellman* (U. S. D. C. E. D. Mich.); *U. S. v. Kuzma* (U. S. D. C. E. D. Pa.); *U. S. v. Forrest* (U. S. D. C. Mo.); *U. S. v. Russo* (U. S. D. C. Mass.); *U. S. v. Carrion* (U. S. D. C. P. R.). Consequently, all Smith Act conspiracy cases have now been disposed of with the exception of *Bary* and *U. S. v. Brandt* (D. C. O.).

The *Bary* case was set for retrial on January 19, 1959. Thereupon petitioners moved to dismiss the indictment on the ground that it was constitutionally defective. Upon argument of this motion, petitioners declined the urgent invitation of the government to move to strike the "organizing" portion of the charge. (R.M. 8.) Instead, petitioners elected to stand on their motion to dismiss, which was denied on January 8, 1959, without opinion. (R. 14.) Four days later, petitioners filed their petition in the Court of Appeals for issuance of the writs in question here. (R. 2.) The matter was argued on January 15, 1959, and the petition denied without opinion on the same day (R. 15). As previously stated, Judge Murrah noted his dissent on the ground that "the indictment is palpably and fundamentally defective because it does not reflect the action of the Grand Jury" (ibid).

Reasons for Granting the Writ

In the absence of an opinion below, it cannot be ascertained whether relief was denied (a) because the court found the indictment not to be constitutionally defective or (b) because it held that review of the constitutional validity of an indictment cannot be had by way of a motion for a writ of prohibition and or mandamus but must await appeal from a conviction after trial. In either aspect, the decision below is contrary to applicable decisions of this Court and presents important questions relating to the administration of justice which should be reviewed.

1. *The Invalidity of the Indictment.*

Prior to the decision of this Court in *Yates*, the government construed the term "organize" in the Smith Act as denoting a continuing process which embraces such activities as the recruitment of members, the formation of new units and the regrouping of existing units. The indictments in *Yates*, *Bary*, and other Smith Act cases, were returned on this theory. They charge a single conspiracy to advocate

proscribed doctrine and to organize the Communist Party as a group that advocates such doctrine.

Yates rejected the construction of the statute on which the "organizing" charge was based. It held that the term "organize" refers only to the original establishment of a group and that, since the Communist Party was "organized" in this sense in 1945, the "organizing" branch of the conspiracy was barred by the statute of limitations. Accordingly, it held that the trial court had erred in denying the defendants' motion to withdraw the organizing charge from the consideration of the jury and remanded the case for a new trial.[4] The Court in *Yates* had no occasion to consider whether the invalidity of the "organizing" charge rendered the entire indictment defective. There appears to have been no motion to dismiss on that ground and, in any event, the defendants by moving to withdraw the organizing charge from the jury had, in effect, consented to the reformation of the indictment. For the same reasons, the validity of the indictment was not considered upon the appeal in *Bary, supra*. Nor was this question raised in such cases as *United States v. Silverman, supra*, or *United States v. Flynn*, 216 F. 2d 354, where the trial court had withdrawn the organizing charge from the jury on motion of the defendants.

Accordingly, neither this Court nor any Court of Appeals has had occasion to consider the question which this case squarely presents: Whether the inclusion of the invalid "organizing" charge infects the entire indictment and renders it fatally defective under the requirement of the Fifth Amendment that no person shall be held to answer for an infamous crime except upon an indictment by a Grand Jury. Petitioners believe that *Ex Parte Bain*, 121 U. S. 1, requires an affirmative answer to this question.

The *Bain* indictment charged the defendant with [illegible]

[4] The Court ordered judgments of acquittal [illegible] the defendants.

ing a false report with intent to deceive the Comptroller of the Currency and his agent. The statute did not make intent to deceive the former a crime. The trial court struck the reference to the Comptroller as surplusage and the case proceeded to trial and conviction. This Court granted habeas corpus on the ground that the trial court was without jurisdiction to proceed to trial because the amendment to the indictment denied the defendant his constitutional right to answer for his offense only on indictment of a grand jury.

Replying to the contention that the reference to the Comptroller was properly stricken as surplusage, this Court said (at 9-10):

> "The party can be tried only upon the indictment as found by such grand jury, and especially upon all the language found in the charging part of that instrument. . . . How can the Court say that there may not have been one or more of the grand jurors who found this indictment, who was satisfied that the false report was made to deceive the Comptroller, but was not convinced that it was made to deceive anyone else? And how can it be said that, with these words stricken out, it is the indictment which was found by the grand jury?"

Petitioners submit that the decision in *Bain* controls this case. Here, as there, the grand jury, acting under a mistake of law, incorporated an invalid charge into the indictment. Here, as there, this error of law may have motivated the action of the grand jurors. It is entirely possible that they were satisfied with the evidence as to "organizing" but doubtful about that as to "advocacy." It cannot be assumed, therefore, that they would have returned the indictment if they had been advised of the invalidity of the "organizing" charge. Hence, as in *Bain*, the invalid charge may not be disregarded as surplusage. Its presence infects the entire indictment, rendering it fatally defective.

The government has conceded throughout that *Bain* prohibits the Court from striking out the invalid "organizing" portion of the charge without petitioners' consent. It urges, however, that at some stage of the trial, the court may properly withdraw the allegations as to "organizing" which appear in the charging part of the indictment. (R.M. 11.) This would accomplish by indirection the precise result which *Bain* says that the Constitution prohibits. The right to be free from prosecution for a felony except upon indictment is a fundamental constitutional right. It cannot be denied to an accused by the subterfuge which the government suggests. "The legal result must be the same, for what cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows. Its inhibition was directed at the thing, not the name." *Cummings v. Missouri*, 4 Wall. 277, 325.

Moreover, the defect in the *Bary* indictment cuts deeper than that in *Bain*. The *Bary* indictment alleges eleven overt acts in furtherance of the conspiracy. Proof of the commission of one of them is, of course, a prerequisite to conviction. Ten are alleged simply as attendance at Communist Party meetings and the eleventh alleges the use of an alias. It is impossible to determine which, if any, of these overt acts was thought by the grand jury to be in furtherance of the "advocacy" phase of the conspiracy and which it regarded as in furtherance of the invalid "organizing" phase. (R. 10, 11.)

The government has not suggested that any of the overt acts be withdrawn from the jury's consideration. Moreover, any such suggestion would, if adopted, substitute the judgment of the court for that of the grand jurors. This is not permissible.

The indictment can be reformed only by conjecturing what the grand jurors might have done if they had been correctly advised on the law. Since the Fifth Amendment

and *Bain* prohibit speculation concerning what "might have been," the indictment is fatally defective.

In one Smith Act case since *Yates*, the District Court denied a motion to dismiss the indictment on the grounds urged by petitioners here. *United States v. Russo*, 155 F. Supp. 251 (Mass.). The court held that the invalid "organizing" portion of the charge was surplusage which could be disregarded or withdrawn by the court without the consent of the defendants.[5] Under the Fifth Amendment and *Bain*, however, matter contained in an indictment is surplusage only where the grand jury's consideration of such matter could not have influenced its decision to return the indictment. As we have shown, that is not the case here. *Ford v. United States*, 273 U. S. 593, relied on by *Russo*, is distinguishable on this ground.[6] Moreover, that case did not involve the problem of rewriting the overt acts, which is fatal to the indictment here.

Salinger v. United States, 272 U. S. 542, is plainly inapplicable. That case states the principle that, at the close of a case, the court may withdraw a portion of an indictment from the jury where the evidence is insufficient to sustain it. The withdrawal of part (or all) of an indictment from the jury for failure of proof does not amend it, for an indictment serves only as an accusation of crime. It may be, and often is, returned on a showing that warrants holding the accused for trial, although the grand

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[5] The court did not undertake to define 'surplusage.' Nor did it consider the problem of distinguishing those overt acts which the grand jury associated with "advocacy" from those it associated with "organizing." The case was decided after a jury had been waived and a bench trial agreed upon. Subsequent to the decision, and on the eve of trial, the indictment was dismissed on the government's motion.

[6] The indictment charged a conspiracy to violate two sections of the criminal code and a treaty. Violation of the latter is, of course, not an offense. This irregularity is analogous to an error in the citation of the applicable statute which, under Rule 7 (c) of the Criminal Rules, does not invalidate an indictment.

jury may not be satisfied that the evidence will turn out to be sufficient to convict.

Here, on the other hand, the effect of the withdrawal of part of the indictment because of its legal invalidity *is* to amend it. The result of this action is to submit to the petit jury a charge that the grand jury might not have returned but for its erroneous view of the law. To do that is to deny the accused a right guaranteed to him by the Fifth Amendment.

2. *The availability of the remedy.*

The court below, of course, had power to issue the writs. 28 U. S. C. 1651. If, as we have demonstrated, the indictment is constitutionally defective, the power should have been exercised. This is established by *Ex Parte Bain, supra*, where the Court, in issuing a writ of habeas corpus, stated (at 13):

> "If there is nothing before the court which the prisoner, in the language of the Constitution, can be 'held to answer,' he is then entitled to be discharged so far as the offense originally presented to the court by the indictment is concerned. The power of the court to proceed to try the prisoner is as much arrested as if the indictment had been dismissed or a *nolle prosequi* had been entered."

It follows that where, as here, the accused are not in custody, prohibition and mandamus are appropriate remedies. This appears from *Roche v. Evaporated Milk Association*, 319 U. S. 21, 26, 27, in which the Court reversed the grant of prohibition and mandamus because the defect in the indictment was "at most an irregularity," and stated that, "This is not a case like *Ex Parte Bain*." Since *Bary is* a case like *Ex Parte Bain*, the writs should have been issued here.

Prohibition and mandamus are peculiarly appropriate for the enforcement of the Fifth Amendment requirement

that infamous crimes shall be prosecuted only upon grand jury indictments. For the Amendment protects the accused against being compelled to "answer" — i.e. against trial — except upon such an indictment. Hence an accused is denied the full protection of the Amendment if he is required to stand trial upon an indictment which is not that of the grand jury and to delay his attack upon its validity until appeal after conviction. His full constitutional right can be vindicated only if the proceeding is halted *in limine* by perogative writs staying the trial and ordering dismissal of the indictment. The refusal of the court below to follow this course was error.

CONCLUSION

The petition for certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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APPENDIX

CONSTITUTION AND STATUTES INVOLVED

1. *The Fifth Amendment:*

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life and limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. *The Smith Act* (18 U. S. C. 2385):

"Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or

Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or

Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruc-

tion of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction."

3. *The All Writs Statute* (28 U. S. C. 1651 (a)):

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

APPENDIX B
ORDERS OF THE COURT OF APPEALS FOR THE TENTH CIRCUIT

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
NO. 6077

[CAPTION] ORDER GRANTING STAY

This cause came on for hearing upon a petition for a writ of prohibition and or a writ of mandamus, which the Court has this day denied.

The Court finds further, however, that a substantial question of law is presented by said petition, and that the petitioners (plaintiffs) are entitled to attempt to proceed in the Supreme Court of the United States of America, if they so desire.

Counsel for petitioners have stated in open court that they do so desire.

WHEREFORE, it is ordered that the respondents, and each of them, stay all proceedings in this case now pending before the Hon. William Lee Knous, Chief Judge of the United States District Court for the State of Colorado, until further order of the Supreme Court of the United States of America, or until Monday, January 26, 1959, at 9:00 o'clock a.m., whichever shall earlier occur.

Dated this 15th day of January, 1959.

s ALFRED P. MURRAH

s JOHN C. PICKETT

s DAVID T. LEWIS

Judges of the United States Court of Appeals

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

NO. 6077

[CAPTION] } **ORDER GRANTING STAY**

This matter coming on for hearing this 15th day of January, 1959, on application of petitioners for leave to file a petition for a writ of prohibition and/or writ of mandamus, the petitioners being represented by their counsel and the government being represented by its counsel and the court being fully advised in the premises,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the petitioners' application for leave to file a petition for a writ of prohibition and/or writ of mandamus be and the same is hereby denied.

Dated this 15th day of January, 1959.

/s/ JOHN C. PICKETT

/s/ DAVID T. LEWIS

Judge Murrah would grant the writ on the grounds that the indictment is palpably and fundamentally defective because it does not reflect the action of the Grand Jury.

Service of the within document is hereby acknowledged.

January ....., 1959: .....

Chief Judge,
United States District Court
for the District of Colorado

January ....., 1959: .....

United States Attorney
for the District of Colorado

January ....., 1959: .....

The Solicitor General